A

STANDARD CHARTERED BANK MALAYSIA BHD

v.

DULI YANG MAHA MULIA TUANKU JA'AFAR IBNI ALMARHUM TUANKU ABDUL RAHMAN, YANG DI PERTUAN BESAR NEGERI SEMBILAN DARUL KHUSUS & ANOTHER CASE

B

SPECIAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD CJ
C ALAUDDIN MOHD SHERIFF CJ (M)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ARIFIN ZAKARIA FCJ
ZULKEFLI MAKINUDIN FCJ
[CIVIL SUIT NOS: 5-2005 & 6-2005]
D 15 OCTOBER 2008

BANKING: *Banks and banking business - Letter of credit - Claim arising from standby letter of credit issued by bank - Whether standby letter of credit irrevocable - Consent of beneficiary - Whether standby letter*
E *of credit legally revoked - Estoppel - Principles applicable - Injunction order - Issue of fraud - Pleadings - Whether claim should be allowed*

There were two related suits. In the first suit, No. 5 of 2005, the plaintiff was Standard Chartered Bank of Malaysia ('SCBMB') and
F the defendant was, in brief, the Yang Di Pertuan Besar of Negeri Sembilan ('DYMM'). The claim was for the sum of USD999,772.44 and commission at the rate of 0.125% per month or, alternatively, for a declaration that SCBMB was entitled to set-off the said sum and commission fee against the fixed deposit of DYMM with
G SCBMB pursuant to a Letter of Set-off executed by DYMM. The claim arose from a Standby Letter of Credit ('SBLC') issued by SCBMB at the request of DYMM to the benefit of Connecticut Bank of Commerce ('CBC'), the beneficiary of the SBLC. As the amount had been paid to CBC, SCBMB claimed against DYMM.
H DYMM counter-sued SCBMB, praying for a declaration that SCBMB was not entitled in law to uplift or apply or appropriate the fixed deposit sum in settlement of any liability arising from the SBLC, damages and costs. That was suit No. 6 of 2005. The issues requiring determination were: (i) whether or not the SBLC
I was irrevocable; (ii) whether SCBMB, having issued the notice of rescission on behalf of DYMM to the confirming bank, Standard Chartered Bank New York ('SCBNY'), on 16 April 1999, was

estopped from recognising or accepting any call on the SBLC or from exercising any rights under the Letter of Set-off; (iii) whether there was payment in defiance of an injunction order obtained by DYMM that, firstly, restrained CBC from calling or drawing upon the SBLC and, secondly, restrained SCBMB from uplifting or exercising any rights under the Letter of Set-off executed by DYMM; and (iv) whether there was fraud by CBC when it made a claim on the SBLC when it had no right to do so. It was argued that the loan to Texas Encore LCC ('TEC') – for which the SBLC was issued – was never released by CBC to TEC in November/December 1999. Therefore, the certification of indebtedness dated 22 and 23 December 1999 were false documents intended to defraud the paying bank.

Held (allowing SCBMB's claim in suit No. 5 of 2005, and dismissing DYMM's claim in suit No. 6 of 2005)
Per Abdul Hamid Mohamad CJ delivering the judgment of the court:

(1) The relevant documents in this case proved that there was not the slightest doubt that the SBLC was irrevocable. The effective date was 11 February 1999 and the expiry date was 31 January 2001, which meant that during that period, so long as the SBLC was not validly revoked and on the presentation of the documents stipulated in the SLBC, the SLBC was available for payment. In other words, the SBLC was an irrevocable SBLC from its effective date. The SBLC could not be revoked unilaterally by a customer; it could only be rescinded with the consent of the beneficiary. Although DYMM issued a letter to SCBMB requesting that the SBLC be suspended, there was no response whatsoever from the beneficiary. It must be noted that the consent in issue was the consent of CBC, the beneficiary. The party sought to be held liable was SCBMB, the issuing bank. Silence by CBC could not be held to amount to consent and neither should SCBMB be held liable simply because it assisted DYMM to convey his intention or decision to rescind the irrevocable SBLC to CBC, something it did out of respect for the status of DYMM while repeatedly stressing its position that consent of the beneficiary was necessary to rescind the irrevocable SBLC. SCBMB was not even obliged to convey the message; therefore, it was ironic to argue that it became liable just

A because it obliged DYMM. In the circumstances, the irrevocable SBLC was not legally revoked or rescinded. (paras 26, 27, 33, 36, 43, 44 & 45)

(2) From the facts, the stand taken by SCBMB was that the B SBLC was clearly irrevocable. However, considering the status of DYMM and the sensitivity of the issue, SCBMB obliged to convey the notice of rescission to SCBNY. There must be a "promise" on the part of SCBMB for DYMM to found *estoppel*. It is not the law of *estoppel* to hold that someone is C *estopped* merely because he obliges another person at the latter's request while at the same time he made clear his legal position on the issue which was to the opposite effect. SCBMB obliged DYMM to send the notice to SCBNY to be passed to CBC for its consent. It was CBC who did not D respond. So, if at all silence was to be taken as consent, it should be against CBC. But CBC was not a party in these suits and its silence did not amount to consent. Neither could it be imputed to SCBNY which was merely asked to convey the notice, which SCBNY was not even obliged to do. E (paras 56, 57 & 59)

(3) The first part of the injunction order restraining CBC from calling or drawing upon the SBLC was, actually, of no concern to the present two suits. CBC was not even a party in these suits. Furthermore, that part of the order was to F restrain CBC and not SCBNY or its principal, SCBMB. The second part of the order *ie*, the order restraining SCBMB from uplifting the Letter of Set-off, had been complied with by SCBMB. That was what these two suits were about. So, there were no merits in DYMM relying on the injunction G order in these two suits. (paras 64 & 65)

(4) DYMM's submission in respect of the issue of fraud ran counter to DYMM's pleaded case in para. 16 of the statement of claim in suit No. 6 of 2005 stating that, notwithstanding H the intimation to suspend the SBLC, CBC proceeded to release the funds to TEC sometime on or about November 1999. It is trite law that parties are bound by their pleadings and DYMM could not now be heard to submit otherwise. (paras 77, 78 & 79)

I

Bahasa Malaysia *Translation Of Headnotes*

Terdapat dua guaman yang berkaitan. Dalam guaman pertama, No. 5 Tahun 2005, plaintif ialah Standard Chartered Bank of Malaysia ('SCBMB') dan defendan ialah, secara ringkas, Yang Di Pertuan Besar of Negeri Sembilan ('DYMM'). Tuntutannya ialah untuk jumlah sebanyak USD999,772.44 dan komisyen pada kadar 0.125% sebulan atau, dalam alternatif, untuk suatu deklarasi bahawa SCBMB berhak menolak jumlah itu dan bayaran komisyen terhadap deposit tetap DYMM dengan SCBMB berturutan dengan suatu Surat Tolakan yang dibuat oleh DYMM. Tuntutan itu berbangkit daripada suatu Surat Kredit Tunggu Sedia ('SBLC') yang dikeluarkan oleh SCBMB atas permintaan DYMM bagi faedah Connecticut Bank of Commerce ('CBC'), benefisiari SBLC itu. Oleh kerana amaun itu telahpun dibayar kepada CBC, SCBMB menuntut terhadap DYMM. DYMM mendakwa balas SCBMB, dan menuntut suatu deklarasi bahawa SCBMB tidak berhak dalam undang-undang untuk meningkat atau menggunakan atau mengasingkan jumlah deposit tetap dalam penyelesaian apa-apa liabiliti yang berbangkit daripada SBLC itu, ganti rugi dan kos. Itu merupakan guaman No. 6 Tahun 2005. Isu-isu yang perlu dibicara ialah: (i) sama ada SBLC itu tidak boleh dibatal; (ii) sama ada SCBMB, setelah mengeluarkan notis pembatalan atas pihak DYMM kepada bank pengesahan, Standard Chartered Bank New York ('SCBNY'), pada 16 April 1999, telah *diestop* dari mengenal atau menerima apa-apa panggilan atas SBLC itu atau dari menggunakan apa-apa hak di bawah Surat Tolakan itu; (iii) sama ada terdapat bayaran yang mengingkari suatu perintah injunksi yang diperolehi oleh DYMM bahawa, pertamanya, menghalang CBC dari menggunakan SBLC itu dan, keduanya, menghalang SCBMB dari meningkatkan atau menggunakan apa-apa hak di bawah Surat Tolakan yang dibuat oleh DYMM; dan (iv) sama ada terdapat fraud oleh CBC apabila ia membuat tuntutannya atas SBLC itu apabila ia tidak mempunyai hak untuk berbuat sebegitu. Ia telah dihujah bahawa satu pinjaman kepada Texas Encore LCC ('TEC') – atas sebab mana SBLC itu dikeluarkan – tidak pernah dilepaskan oleh CBC kepada TEC pada November/Disember 1999. Oleh itu, perakuan keterhutangan yang bertarikh 22 dan 23 Disember 1999 ialah dokumen-dokumen palsu yang berniat memfraud bank yang membayar itu.

Diputuskan (membenarkan tuntutan SCBMB dalam guaman No. 5 Tahun 2005, dan menolak tuntutan DYMM dalam guaman No. 6 Tahun 2005)

Oleh Abdul Hamid Mohamad KHN menyampaikan penghakiman mahkamah:

(1) Dokumen-dokumen relevan dalam kes ini membuktikan bahawa tiada apa-apa keraguan langsung bahawa SBLC itu tidak dapat dibatalkan. Tarikh efektifnya ialah 11 Februari 1999 dan tarikh penamatannya ialah 31 Januari 2001, yang bermakna bahawa semasa tempoh itu, selama SBLC itu tidak dibatalkan dengan sah dan atas persembahan dokumen-dokumen yang disyaratkan dalam SBLC itu, SBLC itu masih lagi ada untuk pembayaran. Dalam kata-kata lain, SBLC itu ialah suatu SBLC yang tidak dapat dibatalkan dari tarikh efektifnya. SBLC itu tidak boleh dibatalkan secara satu pihak oleh seorang pelanggan; ia hanya boleh dibatalkan dengan keizinan benefisiari. Walaupun DYMM telah mengeluarkan satu surat kepada SCBMB meminta bahawa SBLC itu digantung, tiada apa-apa respons langsung daripada benefisiari. Ia mesti diperhatikan bahawa keizinan dalam isu ialah keizinan CBC, benefisiari itu. Pihak yang dituntut sebagai yang bersalah ialah SCBMB, iaitu bank pengeluaran. CBC dengan mendiamkan diri tidak boleh dikatakan sama dengan keizinan dan SCBMB juga tidak harus disalahkan hanya sebab ia telah menolong DYMM untuk menyampaikan niat atau keputusannya kepada CBC untuk membatalkan SBLC itu, sesuatu yang dibuat olehnya kerana menghormati status DYMM sementara menekankan kedudukannya bahawa keizinan benefisiari diperlukan untuk membatalkan SBLC yang tidak dapat dibatal itu. SCBMB tidak wajib untuk menyampaikan mesej itu; oleh itu, ia ironik untuk menghujah bahawa ia mempunyai liabiliti hanya disebabkan ia menolong DYMM. Dalam keadaan ini, SBLC yang tidak dapat dibatalkan itu tidak dibatal dengan sah.

(2) Dari fakta-fakta, pendirian yang diambil oleh SCBMB ialah bahawa SBLC itu jelas tidak boleh dibatalkan. Walau bagaimanapun, memandangkan status DYMM dan betapa sensitifnya isu ini, SCBMB telah menolong menyampaikan notis pembatalan itu kepada SCBNY. Mesti terdapat sesuatu "janji" pada pihak SCBMB untuk DYMM untuk mengasaskan *estoppel*. Ia bukan undang-undang *estoppel* untuk berkeputusan

bahawa seseorang itu telah *diestop* hanya kerana beliau menolong seseorang lain atas permintaan orang yang kedua sementara pada masa yang sama beliau telah menjelaskan kedudukan undang-undangnya atas isu itu, iaitu, bertentangan dengannya. SCBMB menolong DYMM untuk menghantar notis itu kepada SCBNY untuk disampaikan kepada CBC bagi mendapat keizinannya. Ia adalah CBC yang tidak menjawab. Oleh itu, jikapun mendiamkan diri diambil sebagai keizinan, ia adalah terhadap CBC. Tetapi CBC tidak merupakan pihak kepada guaman-guaman ini dan ia mendiamkan diri tidak bermaksud keizinan. Ia juga tidak boleh dikatakan disebabkan oleh SCBNY yang hanya diminta menyampaikan notis itu, yang SCBNY tidak diwajibkan buat.

(3) Bahagian pertama perintah injunksi yang menghalang CBC dari memanggil atas atau menggunakan SBLC itu ialah, sebenarnya, tidak ada kaitan dengan kedua-dua guaman kini. CBC bukan pun suatu pihak dalam guaman-guaman ini. Lagipun, bahagian itu perintah itu ialah untuk menghalang CBC dan bukan SCBNY atau prinsipalnya, SCBMB. Bahagian kedua perintah itu, iaitu, perintah yang menghalang SCBMB dari meningkatkan Surat Tolakan itu, telahpun dipatuhi dengan oleh SCBMB. Kedua-dua guaman ini ialah mengenai itu. Oleh itu, tidak ada apa-apa merit dalam DYMM bergantung kepada perintah injunksi itu dalam kedua-dua guaman ini.

(4) Hujahan DYMM berkenaan dengan isu fraud bertentangan dengan kes yang diplid oleh DYMM dalam perenggan 16 Pernyataan Tuntutan dalam guaman No. 6 Tahun 2005 yang menyatakan bahawa, meskipun ada tanda-tanda untuk menggantungkan SBLC, CBC meneruskan dengan membebaskan duit-duit itu kepada TEC pada atau kira-kira November 1999. Ia adalah undang-undang mantap bahawa pihak-pihak diikat oleh pliding mereka dan DYMM tidak boleh sekarang menghujah sebaliknya.

Case(s) referred to:

Edward Owen Engineering Ltd v. Barclays Bank International Ltd & Anor [1978] 1 AII ER 976 ***(refd)***

LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor [2000] 3 CLJ 473 CA ***(refd)***

RD Harbottle (Mercantile) Ltd v. National Westminster Bank & Ors [1978] QB 146 ***(refd)***

Southern Ocean Shipbuilding Co Pte Ltd v. Deutsche Bank AG [1993] 3 SLR 686 ***(refd)***

Sykt Perumahan Pegawai Kerajaan Sdn Bhd v. Bank Bumiputra (M) Bhd [1990] 2 CLJ 1052; [1990] 3 CLJ (Rep) 159 HC ***(refd)***

Sztejn v. Henry Schroder Banking Corporation [1941] 31 NYS 23D.631 ***(refd)***

United City Merchants (Investments) Ltd v. Royal Bank of Canada [1983] AC 168 ***(refd)***

United Trading v. Allied Arab Bank [1985] 2 LLR 554 ***(refd)***

Other source(s) referred to:

Jack On Documentary Credits, 2nd edn, 1993, pp 209-210

For the plaintiff - Robert Lazar (Rabindra S Nathan & Nad Segaran with him); M/s Shearn Delamore & Co

For the defendant - Dato' Dr Cyrus Das (Mohan Kanagasabai, Kevin Prakash & Shamsul Bahrin Manaf with him); M/s Shook Lin & Bok

Reported by Suresh Nathan

JUDGMENT

Abdul Hamid Mohamad CJ:

[1] There are two related suits. In the first suit, No. 5 of 2005, the plaintiff is the Standard Chartered Bank of Malaysia ("SCBMB") and the defendant is, in brief, the Yang Di Pertuan Besar of Negeri Sembilan ("DYMM"). The claim is for the sum of US999,772.44 and commission at the rate of 0.125% per month or alternatively for a declaration that SCBMB is entitled to set-off the said sum and commission fee against the fixed deposit of DYMM with SCBMB pursuant to the Letter of Set-off. The claim arises from a Standby Letter of Credit ("SBLC") issued by SCBMB at the request of DYMM to the benefit of Connecticut Bank of Commerce ("CBC"), the beneficiary of the SBLC. The amount has been paid to CBC. Hence, SCBMB claims against DYMM.

[2] DYMM counter-sued SCBMB. He prayed for a declaration that SCBMB was not entitled in law to uplift or apply or appropriate the fixed deposit sum in settlement of any liability arising from the said SBLC, damages and costs. That is suit No. 6 of 2005.

[3] We shall now give a very brief chronology of events. A

[4] By a letter dated 5 February 1999 addressed to the Seremban Branch of SCBMB, DYMM applied for the establishment of a SBLC in favour of CBC, the beneficiary.

[5] On 12 February 1999 SCBMB established SBLC no. 312010325732-A ("the SBLC") in favour of CBC. The SBLC was for USD1,000,000. B

[6] By a letter dated 15 February 1999 SCBMB required DYMM to execute a security for the SBLC in the form of a letter of set-off over a fixed deposit in the sum of RM4,180,000 deposited by DYMM with the Seremban branch of SCBMB. The letter of set-off was executed by DYMM. C

[7] By a letter dated 6 April 1999, DYMM wrote to SCBMB asking for the SBLC to be suspended. D

[8] By telex dated 16 April 1999 to the confirming bank, Standard Chartered Bank New York (SCBNY), the SCBMB on behalf of DYMM gave notice of rescission of the SBLC. E

[9] So much of these facts are agreed by the parties.

[10] DYMM further asserts that as at 16 April 1999 the loan by CBC to Texas Encore LLC (TEC) for which the SBLC was issued had not been released by CBC to TEC. F

[11] There was no communication on the notice of rescission dated 16 April 1999 either from SCBMB, SCBNY or CBC with DYMM until 15 December 1999.

[12] Then, on 15 December 1999, by a telephone communication SCBMB was informed by SCBNY that SCBNY had been given notice of drawing on the SBLC for the purpose of retiring off the loan given by CBC to TEC. A copy of the said message dated 15 December 1999 was relayed by SCBMB to DYMM. In that message SCBNY indicated that they had confirmed the SBLC with CBC. G H

[13] DYMM through his attorney (Dato' Hari Menon) immediately communicated with SCBMB and was told by SCBMB by an email dated 16 December 1999 that the onus was on DYMM getting an injunction. DYMM applied for and obtained an I

A *ex parte* injunction on 18 December 1999, restraining, *inter alia* CBC from making a call on the SBLC and also restraining SCBMB from uplifting the fixed deposit of RM4.18 million under the letter of set-off.

B **[14]** SCBMB was notified of the order on 18 December 1999 by personal delivery at its branch in Seremban and Kuala Lumpur headquarters.

[15] On 22 December 1999, and again on 24 December 1999 SCBNY as confirming bank, paid out monies under the SBLC to
C CBC. On 29 December 1999 DYMM obtained an injunction order on an *inter parte* basis, on the same terms as the *ex parte* order obtained earlier.

[16] On 22 December 1999 SCBMB's account with SCBNY
D was debited for USD314,772.44 and on 21 December 1999 for USD685,000, equivalent to the sum paid by SCBNY to CBC.

[17] Those were assertions made by DYMM.

E **[18]** The SCBMB's case may be summarized as follows:

(a) The SBLC was irrevocable and as such was still in force at the material time. It could only be revoked with the consent of the Beneficiary and such consent was clearly not forthcoming.

F

(b) Upon presentation of documents that were regular on their face, SCBNY as confirming bank was under an obligation to make payment to the Beneficiary.

G (c) Consequent upon such payment, SCBMB as issuing bank was liable to reimburse SCBNY and accordingly was entitled to seek reimbursement from the applicant.

[19] The DYMM's case may be summarized under the following headings:

H

(a) Estoppel;

(b) The SBLC was not irrevocable and was validly revoked, prior to the release of the loan by CBC to TEC;

I

(c) Fraud;

(d) Payment in defiance of injunction order; and

(e) Quantum has not been proved.

Is The SBLC Irrevocable?

[20] We shall begin with the facts.

[21] On 11 February 1999 DYMM requested SCBMB to issue a "Documentary Credit". The title of the application form is "Documentary Credit Application." In Box 13 under the title "Goods", the following words were filled in:

> Collateral for USD1 Million Credit Facilities with Connecticut Bank of Commerce, 612 Bedford St., Stamford in favour of Texas Encore L.L.C.

[22] DYMM signed at Box 31 beside the box containing the following words:

> We request you to issue your irrevocable documentary credit for our account in accordance with the above instructions (marked with an X where appropriate).
>
> The credit will be subjected to the current Uniform Customs and Practice for Documentary Credit, International Chamber of Commerce, in so far as they are applicable.
>
> We agree to be bound by the Continuing Commercial Credit Agreement executed/General Conditions appearing on the reverse thereof.

[23] On the reverse of the application form, it is stated:

> The terms and conditions herein set out shall be subject to the Uniform Customs and Practice for Documentary Credits International Chamber of Commerce, currently in force except so far as is expressly stated herein. The terms used herein shall have the same meanings as are set out in the UCP.

[24] SCBMB then issued the "Irrevocable Standby Letter of Credit" as the document is called. It is addressed to CBC, from SCBMB and the applicant being DYMM. Further the SBLC contains the following words:

A Effective Date : 11th February 1999

Expiry Date : 31st January, 2001

: USD1,000,000 (United States Dollars:
One Million Only).

B

At the request and for the account of the Applicant, we hereby establish this irrevocable standby letter of credit in your favour for the purpose of covering unpaid indebtedness due to you arising out of banking facilities granted by you to Texas Ebncore L.L.C.

C **[25]** It is to be noted that throughout the document, the term "Irrevocable Standby Letter of Credit" is used. At p. 3 it is again stated:

This irrevocable standby letter of credit is issued subject to the
D uniform customs and practice for documentary credits 1993 revision, international chamber of commerce publication no. 500.

[26] By merely looking at these documents alone there is not the slightest doubt that the standby letter of credit in question is an irrevocable one.

E

When Is The Effective Date?

[27] This is again very clearly provided by the SBLC itself. The effective date is 11 February 1999 and the expiry date is
F 31 January 2001. What it means is that during that period, so long as the SBLC is not validly revoked and on the presentation of documents (A) and (B) stipulated in the SBLC, the SBLC is available for payment. In other words, the SBLC is an irrevocable SBLC from its effective date. That is its clear meaning.

G **Is The Irrevocable Sblc Revocable Unilaterally?**

[28] The documents referred to so far clearly and repeatedly states that the SBLC was issued subject to the UCP 500, at times in capital letters. The argument that the UCP was not
H brought to the attention of DYMM and that a copy should have been given to him but was not given, is simply untenable. We hold that the SBLC was issued subject to the UCP "in so far as these are applicable" as stated in the "Documentary Credit Application" ie, the application form.

I

[29] Article 6 of the UCP 500 provides: A

(a) a Credit may be either

(i) revocable

or B

(ii) irrevocable.

(b) The Credit, therefore, should clearly indicate whether it is revocable or irrevocable.

C

(c) In the absence of such indication the Credit shall be deemed to be irrevocable.

[30] Pausing here, the SBLC in question is clearly an irrevocable SBLC. The document speaks for itself.

D

[31] Article 8 talks about "Revocation of a Credit". Paragraph (a) provides:

A revocable Credit may be amended or cancelled by the issuing Bank at any moment and without prior notice to the Beneficiary.

E

[32] Article 9 under the heading "Liability of Issuing and Confirming Banks," provides:

(a) An irrevocable Credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the Nominated Bank or the Issuing Bank and the terms and conditions of the Credit are complied with: F

(i) if the Credit provides for sight payment – to pay at sight;

(ii) … G

(b) A confirmation of an irrevocable Credit by another bank (the "Confirming Bank") upon the authorization or request of the issuing Bank, constitutes a definite undertaking of the Confirming Bank, in addition to that of the Issuing Bank, provided the stipulated documents are presented to the Confirming Bank or to any other Nominated Bank and that the terms and conditions of the Credit are complied with: H

(i) if the Credit provides for sight payment – to pay at sight

(ii) … I

A (d) (i) Except as otherwise provided by Article 48, an irrevocable Credit can neither be amended nor cancelled without the agreement of the Issuing Bank, the Confirming Bank, if any, and the Beneficiary. …

B **[33]** So, d(i) is very clear. An irrevocable SBLC cannot be revoked unilaterally by customer.

[34] The High Court of Singapore in *Southern Ocean Shipbuilding Co. Pte. Ltd. v. Deutsche Bank AG* [1993] 3 SLR 686 at 696, in interpreting Article 10(d) of the UCP said:

C By Virtue of Article 10(d) of the UCP, any amendment made to an irrevocable L/C must obtain the consent of the beneficiary.

Has The SBLC Been Validly Revoked Or Rescinded?

D **[35]** We shall now look at the facts regarding the alleged revocation or rescission

[36] On 6 April 1999, DYMM issued a letter to SCBMB Seremban Branch requesting the Irrevocable SBLC be suspended. The letter which bears the "Istana Negara" address and emblem, E *inter alia*, reads:

I had requested a Standby Letter of Credit to be issued in favour of Connecticut Bank of Commerce, U.S.A. for facilities extended to M/s Texas Encore L.L.C.

F I understand that the Banking facilities though approved has not been disbursed till to date.

Kindly therefore **suspend** with immediate effect the Standby Letter of Credit issued to the said Connecticut Bank of G Commerce, U.S.A.

[37] In this respect SCBMB called a witness, Mohd. Taufik bin Syed Abu Bakar ("Taufik"), who was the Manager of the Seremban Branch of SCBMB. In his affidavit evidence, he said:

H Before the issuance of the letter Dato' Menon indicated to me verbally that the DYMM wanted to rescind the Irrevocable SBLC. I informed him that an Irrevocable SBLC could not be suspended or revoked once it was issued. He had asked me verbally around 4 to 5 times and I had repeatedly stated the same answer.

I

[38] He went on to say:

> Despite my position as set out in my answer to question 16 above (ie, the preceding paragraph – added), given the status and position of the DYMM and the sensitivities of the matter, I agreed to request SCBMB Trade Services Division to write to SCBNY and to request them to give notice to the Beneficiary that the DYMM wished to suspend the Irrevocable SBLC.

[39] The request made by fax contained a copy of a draft telex message to be issued by them to SCBNY to be passed on to the beneficiary.

[40] The message was sent to Loo Boon Ping, Trade Finance Division at the Headquarters of SCB in Kuala Lumpur. It reads:

> As per our telephone conversation this morning HRH's Financial Sec. is aware that the SBLC cannot be revoked. I have accordingly intimated to him that, if really need be, the Bank can only write a note to the Beneficiary's Banker and adduce the applicant's intention to suspend the SBLC but still require to get the Beneficiary's approval. Accordingly the former (i.e. Dato' Hari Menon – added) has agreed and a fax from Tuanku Jaafar is enclosed herewith.
>
> Please send the following message to the Connecticut Bank of Commerce, U.S.A.

[41] The content of the message dated 14 April 1999 is as follows:

> Pls relay the following message to the beneficiary …
>
> We were instructed to inform you that notwithstanding having issued the USD1 million standby I/C in favour of Texas Encore LLC for the purpose of getting credit facilities, the same to date despite being approved but have not been disbursed. As such the applicant hereby give notice of intention to suspend the said standby l/C unless the facilities is immediately disbursed. Your urgent response is appreciated.

[42] Two days later, ie, on 16 April 1999 another message was sent replacing the message dated 14 April 1999. The only difference is that the subsequent message states:

> … As such the applicant hereby give notice to rescind the aforesaid standby L/C.

A **[43]** There was no response by the beneficiary or any development on the notice.

[44] We have held that an irrevocable SBLC could only be revoked or rescinded with the consent of the beneficiary. Here, B there was no response whatsoever from the beneficiary. Was the SBLC effectively revoked or rescinded? Our answer is in the negative.

[45] It must be noted that the consent in issue is the consent of C CBC, the beneficiary. The party sought to be held liable is SCBMB, the Issuing Bank. We do not think that silence by CBC can be held to amount to consent. Neither should the Issuing Bank SCBMB be held liable simply because it assisted DYMM to convey his intention or decision to rescind the irrevocable SBLC D to the beneficiary, CBC, something it did out of respect for the status of DYMM while repeatedly stressing its position that consent of the Beneficiary was necessary to rescind the irrevocable SBLC. SCBMB was not even obliged to convey the message. Therefore it is ironic to argue that it becomes liable just because E it obliged DYMM. In the circumstances, we hold that the irrevocable SBLC was not legally revoked or rescinded.

[46] It was alleged that it was only eight months after 16 April 1999 that they were notified that the beneficiary intended to make a call on the irrevocable SBLC. Learned counsel for the SCBMB F pointed out that the statement was incorrect. This is because, by an email dated 23 September 1999, from Patrick Moran the CEO of TEC, to Gwi Chin Fatt, one of the Malaysian investors, Patrick Moran said:

G > My bank must receive a letter reversing the notice months ago that the LC was being withdrawn if not there will be serious consequences.

[47] On the following day, ie, 24 September 1999, Gwi Chin Fatt send an email to Dato' Hari Menon enclosing the said email of H Patrick Moran.

[48] On 27 September 1999, Dato' Hari Menon himself sent an email to Patrick Moran in which he said regarding the SBLC:

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> The question of the L.C. was raised (at a meeting of the Malaysian investors on 22.9.1999 - added) and it was decided the TEC (through you) would approach the Bankers namely Connecticut Bank of Commerce for a variation of the terms of the loan approvals, namely for the waiver on the L.C. requirement to be posted by the Malaysians …

[49] This clearly shows that as on 28 September 1999 in the words of Dato' Hari Menon himself, the SBLC was still in force.

[50] On 5 October 1999, Patrick Moran replied to Dato' Hari Menon's email. Among other things he said:

> Now as to the Letter of Credit. When I received your email, I requested that the bank to withdraw their requirement for the Letter of Credit. The bank explained that there is a problem with the request and had to say no.
>
> …

[51] Leave the letter of credit for now …

[52] On 17 October 1999, Dato' Hari Menon again wrote to Patrick Moran, *inter alia*, saying:

> I do appreciate in you taking the trouble to talk to the Bankers for the withdrawal or waiver of the L.C. by the Malaysians.

[53] On 9 November 1999, Patrick Moran replied to this email. He, *inter alia*, reiterated:

> The Bank will not change the requirements. In fact, as I earlier advised, the Bank cannot change the requirement.

[54] All these emails show that CBC did not consent to the revocation or rescission of the SBLC. They were dated about five to six months after the notice of rescission. We hold therefore that the SBLC was not revoked or rescinded.

Estoppel

[55] Actually, the issue of estoppel has, incidentally, been partly dealt with under the previous topic. Learned counsel for DYMM argued that estoppel was raised in two ways. First, SCBMB having issued the notice of rescission on behalf of DYMM on 16 April 1999, SCBMB was estopped from recognizing or accepting any call on the SBLC or from exercising any rights under the Letter of Set-off.

[56] We have seen from the facts the stand taken by SCBMB was very clear that the SBLC was irrevocable. However, considering the status of DYMM and the sensitivity of the issue, it obliged to assist to convey the notice of rescission to SCBNY.

[57] There must be a "promise" on the part of SCBMB for DYMM to found estoppel. It is not the law of estoppel to hold that someone is estopped merely because he obliges another person at the latter's request while at the same time he made clear his legal position on the issue which was to the opposite effect.

[58] The second way in which estoppel was said to have arisen was put this way by the learned counsel for DYMM:

> Secondly, having remained silent for 8 months without rejecting the notice of rescission, SCBNY as the agent bank of SCBMB, and SCBMB were estopped from recognizing any call on the SBLC.

[59] First, we should be clear about the role of SCBMB and SCBNY. SCBMB obliged DYMM to send the notice to SCBNY to be passed to CBC for its consent. It was CBC who did not respond. So, if at all silence was to be taken as consent, it should be against CBC. But, CBC is not a party in these suits. SCBNY's role was only to convey the notice to CBC. This is recognized by the learned counsel for DYMM in para. 12 of his written submission. In our view, on the facts of this case the silence by CBC did not amount to consent. Neither could it be imputed to SCBNY which was merely asked to convey the notice, which SCBNY was not even obliged to do.

[60] Furthermore, we have also seen that the allegation of eight month's silence is not correct.

Injunction

[61] We should recap here that on 15 December 1999 the notice of drawing on the SBLC was received by SCBMB and relayed to DYMM. On the following day, Dato' Hari Menon informed SCBMB that the loan had not been drawn down and asked SCBMB to convey the message to SCBNY. Taufik, by an email on the same date (16 Decembar 1999) to Dato' Hari Menon said:

> … we cannot send the notice until you serve SCBMB KL AND SCBNY the injunction. The onus is on your getting the injunction immediately before they present the draft or we will have to make payment.

[62] DYMM obtained an injunction order on 18 December 1999. It is to be noted that four parties were named as defendants. They were TEC, Patrick Moran (CEO of TEC), CBC (the Beneficiary) and SCBMB. However, this is what the order says:

> 1. that an injunction be and is hereby granted to restrain the 3rd. Defendant from calling or drawing upon the Standby Letter of Credit No. 312010325732-A dated 12.2.1999 in the sum of USD1 million (1,000,000.00) established by the 4th Defendant in favour of the 3rd. Defendant as beneficiary thereof to retire off or pay any outstanding indebtedness due from the 1st. Defendant.
>
> 2. that an injunction be and is hereby granted to restrain the 4th Defendant from uplifting or exercising any rights under a Letter of Set-Off (undated) executed by the Plaintiff's Principal over a Fixed Deposit of RM4,180,000.00 in the name of Plaintiff's Principal deposited in the Seremban branch of the 4th Defendant.

[63] Note that it is, first, to restrain CBC (the beneficiary) from calling or drawing upon the SBLC. Secondly, it is to restrain SCBMB from uplifting or exercising any rights under the Letter of Set-off executed by DYMM.

[64] In these two suits, actually, we are not concerned with the first part of the order restraining CBC from calling or drawing upon the SBLC. CBC is not even a party in these suits. Furthermore, that part of the order was to restrain CBC and not SCBNY or its principal, SCBMB.

[65] We now come to the second part of the order ie, the order restraining SCBMB from uplifting the Letter of Set-off. That has been complied with by SCBMB. That is what these two suits are about.

So, we see no merits in DYMM relying on the injunction order in these two suits.

A

The Legal Positions In A Letter of Credit Transaction, Fraud, Duty Of Care

[66] Article 3 or the UCP500 provides:

B

> a. Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit. Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or to fulfil any other obligation under the Credit, is not subject to claims or defences by the Applicant resulting from his relationships with the Issuing Bank or the Beneficiary.

C

[67] Article 4 provides:

D

> In Credit operations all parties concerned deal with documents, and not with goods, services and/or other performances to which the documents may relate.

[68] In *R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank & Ors.* [1978] QB 146 at 156, Kerr J said:

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> … banks are only concerned to ensure that the terms of their mandate and confirmations are complied with, e.g. of the conformity of the documents presented … This is unfortunate for the plaintiffs but it is what they have agreed. Banks are not concerned with the rights or wrongs of the underlying disputes but only with the performance of the obligations which they themselves have confirmed.

F

[69] In *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. & Anor* [1978] 1 All ER 976, Lord Denning MR had this to say at p. 981:

G

> A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit. That was clearly stated in *Hamzah Malas & Sons v. British Imex Industries Ltd.* [1958] 2 QB 127 Jenkins LJ, giving the judgment of this court, said, at p 129:

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> ... it seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute which there may be between the parties on the question whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice.

To this general principle there is an exception in the case of what is called established or obvious fraud to the knowledge of the bank. The most illuminating case is of *Sztejn v. J Henry Schroder Banking Corporation* [1941] 31 NYS 2d 631 which was heard in the New York Court of Appeals. After citing many cases Shientag J said this:

> It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade.

He said that in that particular case it was different because:

> ... on the present motion, it must be assumed that the seller has intentionally failed to ship any goods ordered by the buyer. In such a situation, where the seller's fraud has been called to the bank's attention before the drafts and documents have been presented for payment, the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller.

That case shows that there is this exception of the strict rule: the bank ought not to pay under the credit if it knows that the documents are forged or that the request for payment is made fraudulently in circumstances when there is no right to payment.

I would in this regard quote the words of Browne J in an unreported case when he was sitting at first instance. It is *Bank Russo-Iran v. Gordon, Woodroffe & Co Ltd.* (unreported), 3 October 1972. He said:

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> In my judgment, if the documents are presented by the beneficiary himself, and are forged or fraudulent, the bank is entitled to refuse payment if the banks find out before payment, and is entitled to recover the money as paid under a mistake of fact if it finds out after payment.

B

But as Kerr J said in this present case:

> … in cases of obvious fraud to the knowledge of the banks, the courts may preclude banks from fulfilling their obligation to third parties'.

C

At page 983, the learned Master of the Rolls said:

> All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

D

E

[70] In *United City Merchants (Investments) Ltd. v. Royal Bank of Canada* [1983] AC 168 at 182, Lord Diplock said:

F

> It is trite law that there are four autonomous though interconnected contractual relationships involved. (1) The underlying contract for the sale of goods, to which the only parties are the buyer and the seller; (2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller (or to pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents; and the buyer agrees to reimburse the issuing bank for payments made under the credit. For such reimbursement the stipulated documents, if they include a document of title such as a bill of lading, constitute a security available to the issuing bank; (3) if payment is to be made through a confirming bank the contract between the issuing bank and the confirming bank authorizing and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit; (4) the contract between the

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> confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents.
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> Again, it is trite law that in contract (4), with which alone the instant appeal is directly concerned, the parties to it, the seller and the confirming bank, "deal in documents and not in goods," as article 8 of the Uniform Customs puts it. If, on their fact, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, that bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price. The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction of deferment of payment.

[71] This case was referred to by Lim Beng Choon J in *Sykt Perumahan Pegawai Kerajaan Sdn Bhd v. Bank Bumiputra (M) Bhd* [1990] 2 CLJ 1052; [1990] 3 CLJ (Rep) 159. Lim Beng Choon J said:

> a review of the English case law seems to suggest that a performance guarantee, like an irrevocable or confirmed letter of credit, is a guarantee by the bank to a seller for payment of price. The bank is not concerned with the contract entered into by its customer and the third party or with any dispute between the buyer and the seller. The terms of the guarantee and the bank's obligation to pay are contained in the guarantee itself.

[72] This case was quoted with approval by the Court of Appeal in *LEC Contractors (M) Sdn. Bhd. v. Castle Inn Sdn. Bhd. & Anor* [2000] 3 CLJ 473.

[73] Pausing here, it is clear from the authorities that the general principle is that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are on the face of it in order and the terms of the credit are satisfied. However, there is one exception to this general principle: where an "obvious fraud" or a "clear fraud" has been brought to the notice of the bank. In this respect, a breach of the contract between the buyer and the seller, even if it has existed is an insufficient ground for the bank to refuse to pay. The relevant time that the fraud must be brought to the knowledge of the paying bank is prior to the actual payment to the beneficiary – see *United Trading v. Allied Arab Bank* [1985] 2 LLR 554.

[74] That principle having been established, learned counsel for DYMM argued that it was fraud by a beneficiary when he made a claim on the Letter of Credit when he had no right to do so, or as Lord Denning puts it "no honest belief he is entitled to payment." (*United Trading v. Allied Arab Bank* [1985] 2 LLR 554 @ 559). It is fraud where a false or forged document is used by the beneficiary to obtain payment. He referred to *Edward Owen Engineering (supra)* where Lord Denning said at p. 364:

> The bank ought not to pay under the credit if it knows that the documents are forged **or that the request for payment is made fraudulently in circumstances where there is no right to payment.** (emphasis added)

[75] Learned counsel was relying on the under-lined clause. He then drew the court's attention to *Sztejn v. Henry Schroder Banking Corporation* [1941] 31 NYS 23D.631 which was reproduced in *Jack On Documentary Credits* (2nd edn 1993) at pp 209-210 where the bill of lading presented for payment was a false document because the seller had not shipped any goods at all. In that case, the U.S. court observed:

> The distinction between a breach of warranty and active fraud on the part of the seller is supported by authority and reason. As one court has stated: "Obviously, when the issuer of a letter of credit knows that a document, although correct in form, is, in point of fact, false or illegal, he cannot be called upon to recognize such a document, as complying with the terms of a letter of credit.

[76] We have no problem with this argument on this point so far. We shall now see whether on the facts, this is such a case.

[77] Learned counsel argued that in the instant case, the loan was never released to TEC in November/December 1999 for US Dollars 1 million and therefore the certification of indebtedness dated 22 December 1999 and 23 December 1999 were false documents intended to defraud the paying bank.

[78] However, this submission runs counter to the DYMM'S pleaded case in para. 16 of the statement of claim in Suit No. 6 of 2005 which reads:

> 16. The Plaintiff contends that notwithstanding this intimation (i.e. the intimation to suspend the SBLC – added) Connecticut Bank proceeded to release the funds to TEC and/or Patrick Moran **sometime on or about November 1999.** (emphasis added).

[79] It is trite law that parties are bound by their pleadings. Thus learned counsel cannot now be heard to submit otherwise.

[80] In the circumstances we would allow SCBMB'S claim in Suit No. 5 of 2005 as per prayer (i) with interest at the rate of 8% p.a. from the date of this judgment and costs. We would also grant SCBMB the liberty to set off the judgment sum against the fixed deposit pursuant to the letter of set off dated 9 February 1999. DYMM's claim in Suit No. 6 of 2005 is dismissed with costs.

[81] We therefore order accordingly.

[82] Lastly, speaking for myself, I would like to place on record my appreciation for the contributions made by my learned brothers in the preparation of this judgment.